

STATE OF WISCONSIN

PERSONNEL COMMISSION

JAMES A. LA ROSE,
Complainant,

v.

**Chancellor, UNIVERSITY OF
WISCONSIN-MILWAUKEE,**
Respondent.

Case No. 94-0125-PC-ER

**RULING ON
RESPONDENT'S
MOTION TO DISMISS**

Mr. La Rose filed his discrimination complaint on March 16, 1993, alleging that respondent University of Wisconsin (UW) discriminated against him in the terms and/or conditions of his employment because of his age, in violation of the Fair Employment Act. On March 31, 1995, the Commission issued a ruling which found (in part) that the allegation raised in the complaint regarding a demotion on August 1, 1988, was dismissed as untimely filed, and such dismissal was upheld in a Commission Order dated June 9, 1995. Complainant filed an amendment to his complaint on April 26, 1995, which was the subject of a Commission ruling dated July 25, 1995. A fourth Order was issued by the Commission on March 22, 1996, regarding a discovery dispute.

A Commission Equal Rights Officer (ERO) investigated the surviving allegations made in the complaint and in the amended complaint. The ERO issued an Initial Determination (ID) on June 28, 1996, the results of which are summarized in the chart below.

No.	Allegation Summarized	ID Held
1	Respondent created a hostile work environment for complainant after his position was changed in August, 1988 to Coordinator of Staff Services by cutting student employe hours (with the students, in turn, blaming complainant for the cuts), Gensch, a coworker, made disparaging remarks referring to complainant as senior staff, Wilnot commented on complainant's appearance, Gensch allowed fellow worker Gary Markham to harass complainant, and Gensch created friction between complainant and his co-workers by not replacing him when he was on union business or assigned to special projects.	No Probable Cause to be believe that discrimination occurred (hereafter, NPC).
2	In March, 1992, Gensch denied complainant access to the department computer.	NPC

3	Complainant's name was removed from department routing lists, office directory and the department mailbox.	NPC
4	In April 1992, complainant attempted to transfer to another position, but the position was not filled.	Untimely
5	On February 1, 1993, Gensch transferred complainant to third shift.	NPC
6	In April 1993, Gensch asked complainant's co-workers to report on his conduct.	Invalid & NPC
7	In March 1993, complainant's request to be reassigned to a position was denied, and the position was later filled by Dennis Starr on June 7, 1993.	Untimely
8	On September 21, 1993, third shift staff was directed by Gensch to report to second shift staff at least 5 minutes before the start of the shift.	NPC
9	In November, 1994, respondent re-employed Markham for a security job.	NPC
10	In November, 1994, respondent made a job-related telephone call to complainant's home.	NPC
11	In January, 1995, Gensch did not change complainant's work schedule after he requested it.	Invalid.

Complainant filed a timely appeal of the ID, and a prehearing conference was held on September 26, 1996, at which time a briefing schedule was established to consider respondent's motion for summary judgment. Respondent's motion was denied by Commission ruling mailed to the parties on December 5, 1996. The ruling included the following paragraph from p. 5:

The Commission wishes to ensure that all legitimate claims have an opportunity to be heard at hearing without unnecessary delay. . . The parties must file any further motions involving issues reasonably apparent at this stage in the proceedings by February 3, 1997 . . .

The present motion was received by the Commission on February 3, 1997. Both parties submitted written arguments, with the final argument received on March 28, 1997.

OPINION

Respondent's current motion requests dismissal: a) of the allegations which the investigator determined were filed untimely, b) of the allegations which the investigator determined were invalid and, c) of the entire case "on grounds of mootness." Complainant opposed all motions.

Timeliness Issues

Respondent's motion to dismiss based on timeliness principles is specific to the allegations designated as numbers 4 and 7, in the chart on pp. 1-2 above. Complainant requested that the motion be denied, but provided no specific reason (legal or factual) to support his request. The Commission finds that allegations 4 and 7 were untimely filed under the principles discussed in *Tafelski v. UW-System*, 95-0127-PC-ER, 3/22/96.

, There is no dispute that the events described in allegation number 4 occurred prior to the 300-day period which preceded the initial filing of the complaint. There is no dispute that the events described in allegation number 7 occurred after the initial filing and more than 300 days before the amended complaint was filed. Furthermore, each of these allegations involved a discrete event. As to allegation number 4, the complainant knew in or around April 1992, that respondent had denied his transfer request and/or that respondent had decided not to fill the position. As to allegation number 7, complainant knew in or around March 1993, that respondent had denied his request for position reassignment. Complainant does not allege facts to support a conclusion that reason exists under the doctrine of equitable estoppel to toll the limitations period. His contention that he was subjected to a pattern of age discrimination since 1988, is insufficient to toll the limitations period for the discrete events noted in allegation numbers 4 and 7. *Tafelski v. UW-System*, 95-0127-PC-ER, 3/22/96. In conclusion, the Commission grants respondent's motion to dismiss allegation numbers 4 and 7.

Invalid Claim Issues

Respondent's motion to dismiss invalid claims is specific to the allegations designated as numbers 6 and 11 in the chart on pp. 1-2 above. In the ID, the ERO found these claims to be inconsistent with the Commission's ruling of March 31, 1995, and therefore invalid. Complainant requested that the motion be denied, but provided no specific reason (legal or factual) to support his request.

Complainant's various submissions during the investigation of his complaint referenced many actions which he had not included as allegations in the complaint. These additional allegations were detailed in the Commission's ruling of March 31, 1995. The Commission brought this discrepancy to complainant's attention stating as follows:

The Commission also notes that at least some of the complainant's allegations appear to relate to events subsequent to the date the complainant filed his complaint with the Commission. If the complainant intends to pursue a claim relating to these later events, he should file an amended complaint with the Commission. The amended complaint should specifically reference that conduct occurring after March of 1993 which complainant has already referenced in his materials filed with the Commission.

The ORDER portion of the March 31, 1995 ruling, included the following paragraph:

Any amendment to the complaint relating to conduct occurring after March of 1993 which complainant has already referenced in materials filed with the Commission must be filed within 20 days of the date of this order. If such an amendment is filed, the respondent will then have 20 days to indicate if any further supplementation of its answer is required.

An amended complaint (as noted previously in this ruling) was filed on April 26, 1995. Allegation numbers 6 and 11 (as numbered in the chart on pp. 1-2 above) were raised for the first time in the amended complaint. These newly-raised allegations exceeded the parameters of the amendment allowed in the Commission's ruling of March 31, 1995, and accordingly were not considered valid by the ERO.

The Commission realizes that this complainant appears *pro se*. Recognition of this fact lead the Commission in its ruling of March 31, 1995, to inform complainant that allegations previously brought to the ERO's attention which were not included in his complaint were not properly brought before the Commission. The Commission, thus, provided complainant with an opportunity to "cure" the problem if he wished to pursue the claims previously-mentioned. The ERO properly concluded that newly-raised allegations in the amendment exceeded the parameters of the Commission's prior ruling and, accordingly, were not part of case number 94-0125-PC-ER. Nor has complainant requested that the two allegations raised for the first time in his amendment be considered as the basis for opening a separate case. Nor has he provided any argument (factual or legal) to explain why he feels allegation numbers 6 and 11 should not be dismissed. Under these circumstances, the Commission grants respondent's motion to dismiss allegation numbers 6 and 11.

Motion to Dismiss “Based on Mootness”

The Commission now turns to the portion of respondent’s motion to dismiss “based on mootness.” The full texts of respondent’s motion and complainant’s response are shown below:

Respondent’s motion: Effective January 3, 1997, the complainant ceased being an employee of the respondent as a result of his retirement. Therefore, this matter should be dismissed because: (a) the Personnel Commission no longer has jurisdiction; (b) no remedy is available to be granted and; (c) this matter in its entirety is now moot.

In support of this motion, a copy of the complainant’s memo to his superior documenting his retirement is enclosed.

Complainant’s response: I am requesting that the respondent’s Motion to Dismiss on the Grounds of Mootness and Request for a Formal Ruling be denied.

Mr. Hamann and Mr. Wilmot have finally achieved their objective of constructively firing me by forcing my retirement. This issue is not moot to my family or me. The respondent’s Motion to Dismiss on Grounds of Mootness is analogous to saying that murderers should not be held accountable because their victims are dead. Age discrimination is not a moot issue as long as it is allowed to continue at the University. Mr. Hamann and Mr. Wilmot need to be held accountable for their acts of discrimination. To drop my case now would sanction their illegal acts of discrimination and would encourage them to arbitrarily discriminate against other university employees.

The Commission notes as a preliminary matter that the case presently before the Commission does not include the question of whether discrimination occurred in connection with complainant’s retirement. Such event occurred after the complainant and amended complaint were filed and, accordingly, cannot be construed as being part of the same case. Nor has complainant filed a separate discrimination complaint relating to his retirement.

An issue is moot when a determination is sought which can have no practical effect on a controversy. *State ex rel. Jones v. Gerhardstein*, 135 Wis. 2d 161, 169, 400 N.W.2d 1 (Ct. App., 1986), citing *Warren v. Link Farms, Inc.*, 123 Wis. 2d 485, 487, 368 N.W.2d 688, 689 (Ct. App., 1985). The focus, generally, is upon the available relief in relation to the individual complainant (*see, e.g., Lankford v. City of Hobart*, 36 FEP Cases 1149,1152 (10th Cir., 1996) and *Martin v. Nannie and the Newborns*, 68 FEP Cases 235, 236 (W.D. Okla., 1994)) but may shift to a consideration of others in the workplace when an overt policy of discrimination is

alleged to impact on a category of employees (*see, e.g., Kennedy v. D.C.*, 65 FEP Cases 1615, 1617 (D.C. Cir., 1994), involving review of a grooming code.)

The mootness question in relation to the case before the Commission is whether complainant's retirement, an event occurring after his complaint was filed, precludes the Commission from granting effective relief to complainant. *See*, 2 Am Jur 2d, *Administrative Law*, §519. Resolution of this question involves a review of the surviving claims and the available related remedies.

The surviving claims, in terms of the numbering system used in the chart on pp. 1-2 above, include allegations numbered 1, 2, 3, 5, 8, 9 and 10. The Commission's authority to render a remedy is limited. The remedy available for each surviving allegation is noted in the chart below.

No.	Allegation Summarized	Relief Available
1	Respondent created a hostile work environment for complainant after his position was changed in August, 1988 to Coordinator of Staff Services by cutting student employe hours (who, in turn, blamed complainant for the cuts), Gensch made disparaging remarks referring to complainant as senior staff, Wilmot commented on complainant's appearance, Gensch allowed fellow worker Gary Markham to harass complainant, and Gensch created friction between complainant and his coworkers by not replacing him when he was on union business or assigned to special projects.	A Commission order directing respondent to cease and desist from engaging and from allowing coworkers to engage in the activities against complainant which created the hostile and harassing atmosphere about which he objects.
2	In March, 1992, Gensch denied complainant access to the department computer.	A Commission order directing respondent to cease and desist from denying complainant access to the department computer.
3	Complainant's name was removed from department routing lists, office directory and the department mailbox.	A Commission order directing respondent to cease and desist from removing complainant's name from the noted registries.

5	On February 1, 1993, Gensch transferred complainant to third shift.	A Commission order directing respondent to cease and desist from changing complainant's shift times and/or to return complainant to his previous shift.
8	On September 21, 1993, third shift staff was directed by Gensch to report to second shift staff at least 5 minutes before the start of the shift.	A Commission order directing respondent to cease and desist from requiring complainant to report early for work.
9	In November, 1994, respondent re-employed Markham for a security job. The complaint here is that Markham was allowed to return to work and he had been a coworker who harassed complainant.	A Commission order directing respondent to cease and desist from allowing Mr. Markham to harass complainant.
10	In November, 1994, respondent made a job-related telephone call to complainant's home.	A Commission order directing respondent to cease and desist from calling complainant at his home regarding job-related matters.

Each of the potential remedies noted above would be considered effective only if complainant were still employed by respondent. Since complainant is now retired, the relief available from the Commission would be ineffective. Accordingly, respondent's motion to dismiss the remaining claims on the ground of mootness is granted.

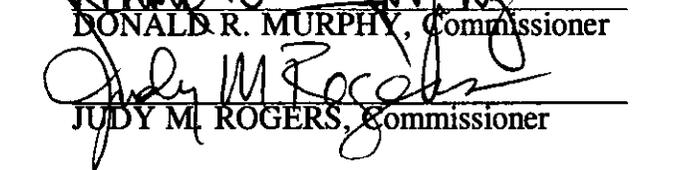
ORDER

That respondent's motion be granted and that this case be dismissed.

Dated: April 2, 1997.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

JMR
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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

2/3/95